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IN THE

Supreme Court of the United States

October Term, 1945

No. 969 - 63 - 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. Whitney, President and S. E. Harvey, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the

United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on the 21st day of December, 1945.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 152 F(2d) 325.

JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1945 (45 U. S. C., Sec. 151, et seq.) are set forth in the appendix to this petition.

STATEMENT OF THE MATTER

Prior to August, 1941, the First Division of the National Railroad Adjustment Board assumed jurisdiction, pursuant to the provisions of Section 3, First (h) of the Railway Labor Act, of disputes involving railroad yardmasters and rendered awards in such disputes (R. 230).[1]

On March 21, 1938, the Railroad Yardmasters of America, intervenor herein, filed the disputes of three individual yardmasters with the Fourth Division of the Adjustment Board (R. 231). The carrier and labor members of the Fourth Division deadlocked on the question of the jurisdiction of that division to hear these cases (R. 231, 174, 175). Thereupon, the Railroad Yardmasters of America brought action in the United States District Court for the Northern District of Illinois, Eastern Division, against the

[1] Unless otherwise indicated, all references are to the record in the United States Circuit Court of Appeals.

members of the Fourth Division for a writ of mandamus commanding the Fourth Division to docket and hear the three submissions (R. 158). The members of the First Division were not made parties to the action (R. 158). The carrier members of the Fourth Division filed answer admitting the allegations of the petition (R. 175). No answer was filed by the labor members of the Fourth Division (R. 177). On July 11, 1938, the District Court, Honorable William H. Holly presiding, entered its decree, known in this record as Chancery No. 16031, holding that the Fourth Division had exclusive jurisdiction of yardmaster disputes and ordering that division to hear the three disputes submitted to it (R. 176, 181).

In this action, the Railroad Yardmasters of America plead the decree in Chancery No. 16031 as a final and binding adjudication of the issues raised by the petitioners (R. 115). Both the District Court and the Circuit Court of Appeals held it not to be res adjudicata, the trial court stating in its memorandum opinion that the decree had been induced *by collusion of the parties and without any consideration of the issues involved* (R. 224).

Following the entry of decree in Chancery No. 16031 on July 11, 1938, and based thereon, the Fourth Division assumed jurisdiction to hear and render awards in disputes involving yardmasters submitted to it (R. 231). The First Division likewise *continued* to assert jurisdiction over yardmaster disputes until August, 1941 (R. 230, 231).

On August 28, 1941, the five carrier members of the First Division of the Adjustment Board directed a letter to the five labor members of that division stating that in view of the decree in Chancery No. 16031 of July 11, 1938, the carrier members of the First Division would not agree to set yardmaster cases docketed with it for hearing. The letter proposed that these cases and similar disputes and submissions arising in the future be docketed with the Fourth Division "since it appears that by the terms of the amended Railway Labor Act, as construed by the District

Court of the Northern District of Illinois, Eastern District, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourth Division." The carrier members did not state, however, that yardmasters were not "yard-service employees" within their own understanding of that term (R. 27-29).

Since August 28, 1941, the carrier members and the labor members of the First Division have been deadlocked on the question of the jurisdiction of that division over disputes involving yardmasters, and such disputes docketed with the First Division by the petitioners remain unconsidered and unadjusted (R. 231).

The single issue presented in the District Court and to the Circuit Court of Appeals was whether Congress intended to use the term "yard-service employees" in Section 3, First (h) of the Railway Labor Act as inclusive of the craft and class of yardmaster employees, as well as other yard-service crafts, so as to confer jurisdiction on the First Division of the Adjustment Board. It was not disputed that yardmasters are "employees" within the meaning of the Act.

The classes or crafts of railroad employees who perform yard work include engineers, firemen, hostlers, conductors, brakemen, flagmen, baggagemen, switch tenders, yard helpers and others. All of these employees are supervised by a yardmaster in performing yard work, such as switching, making and breaking up trains, storing cars, and moving trains into, out of and through the yard (R. 162-169, 77-88).

In interpreting Section 3, First (h) of the Railway Labor Act, the District Court and the Circuit Court of Appeals ignored documentary proof of the general use in the industry of the term "yard-service employees" as inclusive of yardmasters, the object of the Act as shown by its design and scheme, and concluded further that the historical background of the Act, its administrative construction, and the rejection of amendments proposed in Congress designed to exclude yardmasters' disputes from the jurisdiction of the

First Division, were valueless in arriving at the intent of Congress.

The District Court, in holding that yardmasters were not in "yard-service," relied entirely upon the *oral testimony* of three railroad executives who testified for the respondents to the effect that within their experience and knowledge "yard-service employees" did not include yardmasters (R. 191, 196, 197). This testimony was directly contradicted by oral testimony offered in rebuttal by the petitioners (R. 211, 213).

The Circuit Court of Appeals held that the oral evidence relied upon by the trial court supported findings of fact 7 to 13 inclusive,[2] in which the trial court "defined" the term "yard-service employees" as not including yardmasters, and concluded that it was "bound" by the findings. The judgment of the Circuit Court rests on this conclusion alone for it also ignored or rejected the design and scheme of the Railway Labor Act, its historical background, its administrative construction, and congressional disapproval of proposed amendments as not indicative of the intent of Congress.

The facts in this case which warrant the issuance of a writ of certiorari are:

1. The First Division of the Adjustment Board has been deprived of jurisdiction of yardmaster disputes by an interpretation of the Railway Labor Act based solely on *conflicting oral testimony* as to the meaning of the term "yard-service employees" as used in Section 3, First (h) of the Act.

2. The Interstate Commerce Commission, the Railroad Retirement Board, the National Railroad Adjustment Board, the National Mediation Board, the 1943 Emergency Board appointed under the Railway Labor Act, the Train Service Board of Adjustment for the Western Region, and the Director-General of Railroads in World War I have in

[2] The petitioners did not challenge findings of fact number 1 through 6 on the appeal to the Circuit Court.

official documents repeatedly recognized the term "yard-service employees" as specifically inclusive of yardmasters.

3. At the time of the enactment of the 1934 amendments yardmasters had been traditionally aligned with the train and yard-service crafts for submission of their disputes to boards of adjustment created by the Director-General of Railroads in World War I, under the Transportation Act of 1920, and under the Railway Labor Act of 1926.

4. The administrative construction placed on Section 3, First (h) of the Railway Labor Act by the First Division in accepting yardmaster disputes prior to 1941 is held without weight in ascertaining the intent of Congress, although the First Division, composed of ten representatives of the rail carriers and the transportation brotherhoods, all expert in railroad terminology throughout the United States and thoroughly familiar with the history of the boards of adjustment prior to the 1934 amendments, repeatedly held that it had jurisdiction in such cases.

5. The decision throws the disputes of an important *rail* craft to a board composed of representatives of *water* carriers and *maritime* unions contrary to the basic object of this section of the Railway Labor Act.

6. Two bills have been introduced in Congress by the American Short Line Railroad Association designed to *exclude* such disputes from the jurisdiction of the First Division and both were *rejected* by the Congressional committees to which they were referred.

QUESTION PRESENTED

Does the First Division of the National Railroad Adjustment Board have jurisdiction over disputes involving railroad yardmasters within the meaning of Section 3, First (h) of the Railway Labor Act, as amended?

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has construed the Railway Labor Act solely on the basis that it was bound by the trial court's findings drawn from conflicting oral testimony of the witnesses' own understanding of the meaning of a term used in the Act, contrary to conclusive documentary evidence of the established use and acceptance of the term by the industry and contrary to recognized rules for statutory interpretation announced by this court in numerous decisions and particularly in this court's decisions in:

MacEvoy vs. United States, 322 U. S. 102
Great Northern Railway Co. vs. United States, 315 U. S. 262
Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349
United States vs. Cooper Corp., 312 U. S. 600
Norwegian Nitrogen Products Co. vs. United States, 288 U. S. 294.

2. The decision is the first binding interpretation of the jurisdiction of the several divisions of the Adjustment Board as defined by Section 3, First (h) of the Railway Labor Act. It creates narrow jurisdictional distinctions between the several divisions of the Board which must inevitably foster future conflict and hamper the Board in the exercise of its functions.

3. The decision throws the disputes of an important rail operating craft governed by technical agreements concerning rates of pay, rules and working conditions to the jurisdiction of a division of the Board formed to hear the disputes of marine carriers and their employees, thereby destroying in part the basic object in the formation of the Board.

4. The decision casts doubt on the validity of many awards by the divisions of the Board involving employees

whose duties are of a supervisory character, including many awards in yardmaster disputes by the First Division.

5. The decision will tend to promote industrial strife among employees engaged in the rail transportation industry in the United States by undermining their confidence in the procedures for the settlement of their disputes under the Railway Labor Act.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PRELIMINARY STATEMENT

We refer to the foregoing petition for a citation of the opinion below, a statement of the grounds of jurisdiction,

a citation of the statute involved and a summary statement of the case.

ARGUMENT

This case involves the interpretation of an Act of Congress which is the product of fifty years of legislation in the field of rail carrier labor relations. Nevertheless, the Circuit Court held that it was "not helpful in determining the question" to consider or give weight to the historical background of the 1934 amendments to the Railway Labor Act creating the Adjustment Board. Nor did it give weight to the administrative construction of the act by ten rail carrier experts on the First Division, or the failure of Congress to act on proposed amendments to the act designed to exclude yardmaster disputes from the jurisdiction of the First Division. Further, the Circuit Court ignored entirely the scheme and design of the statute which clearly defined the object and purpose of Congress to provide a board the separate divisions of which would be expert in the handling of particular types of disputes.

The result is that yardmaster disputes are thrown to the Fourth Division on the sole basis of the opinion of the circuit court that it was bound by the findings of the trial court as to the "definition" of the term "yard-service employees"; and this "definition" is in turn derived solely from *conflicting oral testimony* of four witnesses who testified as to their understanding of the meaning of the term in the industry.

We respectfully submit that the Circuit Court followed an unprecedented course in arriving at an interpretation of the jurisdiction which Congress intended to confer on the First and Fourth Divisions of the Adjustment Board. We further submit that the "definition" given the term "yard-service employees" by the trial court is utterly at variance with the conclusively established use of the term in the rail industry as inclusive of yardmasters; and whether it be "definition," historical background, adminis-

trative interpretation, or statutory scheme and design, every available guide points to Congressional intent to delegate jurisdiction over yardmaster disputes to the First Division of the Adjustment Board.

I.

The term "yard-service employees" has long been used in the trade to designate numerous crafts and classes of rail employees engaged in yard-service (as distinguished from road service), including the class and craft of yardmasters.

The trial court entered findings of fact 7 to 13, inclusive, relative to trade usage of the term "yard-service employees" (R. 232-233). The findings are a mixture of fact and conclusion and only in findings 11 and 13 does the court assign a meaning to the term. In finding No. 11, the court stated that "yard-service employees" referred "*solely* to railroad employees engaged in making and breaking up trains and switching cars within yard limits" which clearly includes yardmasters except for the designation of crafts intended to exclude them (R. 232). In finding No. 13 the court stated that "railroad usage, as evidenced by the testimony of experienced railroad officials and representatives of railroad employees, has *never* included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yardmen' * * * " (R. 233).

The "definition" adopted by the trial court is drawn from *conflicting oral testimony*. Three railroad executives testified for the respondents (R. 190, 195, 196). The witness Theodore L. Green stated that within *his own experience and knowledge* the term referred to certain employees who make and break up trains exclusive of yardmasters and he distinguished yard employees by the general distinction *between yard service and road service* (R. 213). The other two witnesses for the respondents merely concurred in Green's testimony (R. 196, 197). For the peti-

tioners in rebuttal, F. H. Nemitz testified that he had been engaged in railroad or brotherhood work for a number of years over the entire United States and that within his experience and knowledge the term "yard-service employees" was used as inclusive of yardmasters (R. 211-212, 213-215, 217). There was, therefore, a conflict in the oral evidence as to the witnesses' understanding of the meaning of the term. The lower courts, we submit, overlooked this conflict in the testimony and erroneously emphasized lack of conflict in support of their conclusions. For the convenience of the court, we have set forth in an appendix hereto the relevant oral evidence relating to this issue.[1]

The Circuit Court, in reviewing the decision of the trial court, approached the problem before it not as one of establishing the intent of Congress from all available sources but rather one of determining whether there was *some* evidence to support the trial court's findings *irrespective of whatever evidence there was to the contrary.* Weight was given to the findings as though credibility of witnesses was a decisive factor. And the Circuit Court held that the proper interpretation of the Act followed *as a legal conclusion* from findings of fact as to a purported trade use of the statutory term involved. Documentary references establishing conclusively the use of the term involved were ignored. Further, the oral evidence does not support the sweeping assertions of the findings as to railroad usage, and the evidence as a whole, oral and documentary, overwhelmingly refutes any generally restricted use of the term.

It is submitted that the approach used by the Circuit Court is directly contrary to the decisions of this court in

[1] Aside from the oral testimony, the respondent pointed to several submissions to the Adjustment Board with the claim that some general chairman for one or the other of the brotherhoods had used language in the submission that appeared by inference to distinguish yardmasters from yard service employees. It will be noted that the instances cited were so inconclusive that neither the District Court nor the Circuit Court referred to them in support of the findings. (See for instance R. 200, Respondents Exhibits 3, 3-A, 1-B, 1-E, 1-F, 3-B.)

respect to recognized principles of statutory interpretation and the weight to be accorded the findings of the trial court in these circumstances. *MacEvoy vs. United States, 322 U. S. 102; Great Northern Railway Co. vs. United States, 315 U. S. 262; Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349; United States vs. Cooper Corp., 312 U. S. 600; Norwegian Nitrogen Products Co. vs. United States, 288 U. S. 294; District of Columbia vs. Pace, 320 U. S. 698.* Further, this approach led the court to assign a meaning to the statutory term that is dependent solely on the personal understanding of three witnesses *contrary to conclusive documentary proof of the meaning of the term in the railroad industry.*

The term "yard-service employees" is but one of several designations used to segregate rail employees by crafts or classes according to the type of work engaged in. Rail employees are generally designated either as "operating employees" or as "non-operating employees." Employees engaged in the movement of freight and passenger trains are usually designated as "operating employees." Those engaged in maintenance work, communication services, ticket sales and other duties incident to, but not directly connected with, the movement of trains, are designated as "non-operating employees." Operating employees are also further sub-divided as between "road-service employees," who work between terminals, and "yard-service employees," who work within yard limits[2] (R. 191, 211).

[2] The terminology referred to is clearly illustrated by the following excerpt from the *Report to the President by the Emergency Board appointed May 31, 1943*, pursuant to the Railway Labor Act. This report, on file with Library of Congress, Washington, D. C., at p. 11 reads as follows:

"The railroad workers involved in this dispute are train and engine and *yard service employees* who, for the most part, are engaged in the actual movement of freight and passenger trains. They are frequently referred to as 'transportation employees or '*operating employees*,' in contrast to the '*non-operating employees*' who maintain railroad tracks and equipment, handle freight shipments and sell passenger tickets, and perform a multitude of other duties necessary in the transportation of freight and passengers by rail.

"Out of a total of approximately 1,350,000 workers on the payrolls of class I carriers in May 1943, about 315,000 were operating employees whose proposals for a general wage increase are before this Board.

"Most *operating employees* are engaged in '*road service*,' that is, in the

Ordinarily crafts or classes of rail employees are grouped together in relation to the designation above noted. For instance, the First Division of the Adjustment Board has jurisdiction over the disputes of well known crafts of "operating employees." The Second and Third Division of the Adjustment Board, in the main, have jurisdiction over the disputes of "nonoperating employees." The Fourth Division has jurisdiction over disputes of employees of marine carriers and a "catch-all" jurisdiction of isolated rail employees few in number and not generally organized along craft lines at the time of the enactment of the Railway Labor Act such as patrolman, stock claim agents and others.

For many years yardmasters, whose duties are primarily concerned with supervision of train and switching movements within the yard (R. 162-168, 193, 75-88), and who are ordinarily promoted from, or demoted to, the yard train and engine crafts (R. 203, 212), have been grouped and referred to as operating employees in yard service.[8] Agencies intimately associated with the railroad industry

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performance of various duties required for the movement of freight and passenger trains from one locality to another. A substantial number of railroad workers, however, are employed in '*yard service.*' The duties of this group include the making up and the breaking up of trains in connection with the preparation for, or the culmination of, terminal to terminal runs. These employees, furthermore, handle the switching of cars for industries within terminal or yard limits, which involves the placing of loaded or empty cars on the tracks or sidings of factories and industrial concerns and the picking up of unloaded or loaded cars from these tracks, and they also interchange cars between connecting carriers.

"There are thus two types of work performed by this large group of employees — *road service*, which in turn is divided into freight and passenger service, *and yard service*. The largest number of employees are engaged in road freight service. In May 1943 slightly more than 141,000 or 45 percent of the approximately 315,000 railroad transportation employees were engaged in such service. Nearly 44,000 employees or about 13 percent of the total were in passenger service, and approximately 130,000 or 42 percent were *employees in yard service*, including switch tenders, hostlers, *and yardmasters.*" (Emphasis supplied.)

[8] In the lower courts the respondents relied heavily on the fact that in addition to supervision of the various operating yard crafts, the yardmaster also has charge of clerical workers and other nonoperating employees not ordinarily classed as yard service employees (R. 162, 213). The record is clear, however, that yardmasters are mainly concerned with train and switching movement within the yard and have always been known as operating employees "in yard service."

over long years have repeatedly recognized this established and accepted practice and usage. The Interstate Commerce Commission, the National Railroad Adjustment Board, the National Mediation Board, the 1943 Emergency Board, the Railroad Retirement Board, the Train Service Board of Adjustment for the Western Region, and the Director-General of Railroads in World War I have specifically grouped and referred to yardmasters as employed in "yard-service" or as operating employees. All of these references were made in official documents, some of which were in the form of reports to Congress and are, of course, drawn from an extensive knowledge of the rail industry and its terminology. The uniformity of terminology by these various agencies as used in the following references illustrate beyond controversy the use of the term "yard-service employees" as inclusive of yardmasters:

1. The Emergency Board appointed May 31, 1943, by the President of the United States, pursuant to the Railway Labor Act, in its report[4] dated September 25, 1943, stated:

> "There are thus two types of work performed by this large group of (operating) employees — road service, which in turn is divided into freight and passenger service, and yard service * * *. Nearly 44,000 employees, or about 13% of the total, were in passenger service, and approximately 130,000, or 42%, were employees *in yard service, including switch tenders, hostlers, and yardmasters.*[5]

2. The Interstate Commerce Commission in its report[6] *to the House of Representatives* of the United States, dated December 13, 1932 (over a year and a half prior to the 1934 amendments to the Railway Labor Act), on the effect of a six-hour day in the employment of all classes of railroad employees, under the heading "Groups of Employees," listed:

[4] Library of Congress, Washington, D. C.
[5] Emphasis is supplied in the petition and brief unless otherwise noted.
[6] Library of Congress, Washington, D. C.

"I. Executives, Officials and Staff Assistants.
II. Professional, Clerical and General.
III. Maintenance of Way and Structures.
IV. Maintenance of Equipment and Stores.
V. Transportation (*Other Than* Train, Engine, and *Yard*).
VI(a) Transportation, (*Yardmasters*, Switch Tenders and Hostlers).
(b) Transportation (Train and Engine Service)."

3. In the First, Second and Third Annual Reports of the National Mediation Board to Congress[7] covering the period from June 30, 1934, to June 30, 1937, the National Mediation Board compiled information concerning the agreements of yardmasters and those of other employees in yard work under the heading "Yard Service Employees."

Also the First Annual Report of the National Mediation Board for the fiscal year ended June 30, 1935, in Table VII, p. 35, listed the number of carriers having agreements with "yard-service employees" and made reference to the fact that the number of agreements with system associations "includes twenty separate agreements with *yardmasters* in addition to the agreement held by the National Labor Organization for *the other yard service employees.*"[8]

4. The Railroad Retirement Board in its Operating Manual for Field Offices,* Section 603, lists the crafts represented by the various rail brotherhoods and includes therein the following reference:

"Brotherhood of Railroad Trainmen * * * *in yard service . . . yardmasters, assistant yardmasters,* yard conductors, foremen, flagmen, switch tenders * * *"

[7] Library of Congress, Washington, D. C.

[8] The same classification appears in Table IX at p. 28 of the Second Annual Report of the National Mediation Board for the fiscal year ended June 30, 1936. Likewise, in Table VIII of the First Annual Report, Table X of the Second Annual Report and Table X of the Third Annual Report, the Board, under the heading "Yard Service Employees" listed wage and rail agreements between Class I carriers and rail employee representatives, *including those of the Railroad Yardmasters of America, intervenor herein, who represents yardmasters exclusively.* (In subsequent Annual Reports the rail crafts, including yardmasters, were designated by crafts rather than grouped by general designations.)

* Library of Congress, Washington, D. C.

5. The Train Service Board of Adjustment for the Western Region, in Decision No. 2948, dated February 21, 1929 (R. 209, Exhibit J.), set forth a joint statement of the facts of the dispute as submitted *by the carrier* and the Order of Railway Conductors, as follows:

> "Joint Statement of Facts: *Prior to 1920* and subsequent thereto, E. J. McMartin, J. E. Elliott, and H. T. Ireland were employed in the Chicago freight terminal *as yardmasters.* On or about January 1, 1927, they were permitted to give up these positions and displace conductors from positions in the Chicago switching district on the basis of their employment *for yard service prior to 1920.*".

6. The Director-General of Railroads in General Order No. 27 with its supplements, addenda, amendments and interpretations issued by the Director-General of Railroads, on April 23, 1919,* stated:

> "Effective January 1, 1919, where there is no existing agreement or practice more favorable to employees, the wages of yard foremen *who also act as yardmasters* (*designated in some schedules as 'foot-board' yardmasters*) will be not less than 40 cents per day in excess of the yard foreman's rates. The same rules for the basic day and overtime shall apply to such employees as applies to *other yardmen.*"

7. The National Railroad Adjustment Board in its Official Index Digest to the Awards of the First Division† published in three volumes on July 1, 1939, March 1, 1941, and March 1, 1943, under the heading "Yard Service" lists as a sub-heading "Yardmasters." In the "General Index," of these volumes, the Awards involving yardmasters are digested under the heading "Yardmasters" which appears as a sub heading under the general heading "Yard Service." The same index outline was followed by the Train

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* General Order No. 27, together with its supplements and interpretations, is on file among the United States Railroad Administration records in the National Archives, Washington, D. C.

† Library of Congress, Washington, D. C.

Service Board of Adjustment for the Western Region for its Index of Decisions published March, 1928 and May 1, 1931.

We submit that it is inconceivable that over many years there should be this uniformity of terminology by the separate agencies most intimately familiar with the rail industry unless in general usage the term "yard-service employees" as inclusive of all operating yard crafts including yardmasters had become established in the industry. The statistical reports of these agencies are made up *directly from reports by the rail carriers.*

II.

Yardmasters have been aligned with the other train and yard service crafts for the submission of their disputes to the same Board of Adjustment for nearly a quarter of a century.

The Circuit Court expressed the opinion that "the historical alignment of yardmasters with the train and yard service crafts in the settlement of disputes is not helpful in determining the question now before us." We submit that this historical alignment of yardmasters with the other train and yard service crafts had significance in construing Section 3; First (h) of the Railway Labor Act. The 1934 Amendments to the Act creating the Adjustment Board did not substantially change the historical alignment of rail crafts for the submission of their disputes. Under the 1934 Amendments employees represented by the five operating rail brotherhoods submit their disputes to the First Division; disputes of the shop crafts or non-operating employees are submitted to the Second Division; and disputes of telegraphers, clerical employees, sleeping car conductors, porters and other crafts, go to the Third Division.

This alignment of crafts is substantially identical to the craft alignment for the submission of disputes under

boards of adjustment created by the Director-General of Railroads in 1918, under the Transportation Act of 1920, and under the Railway Labor Act of 1926.[10]

The Circuit Court, we believe, gave a disproportionate emphasis to the fact that some yardmasters, either because of representation by the Switchmen's Union or because of no union representation, did not submit their disputes to the same Board as did the other train and yard service crafts. All that is significant here is that the 1934 Amendments corrected this defect in the former Boards by making jurisdiction of all Divisions dependent on craft employment rather than upon membership in the union representing the particular craft, but these changes were certainly not so material as to destroy the similarity of craft alignment before the present Adjustment Board as before the earlier Boards, nor did they mark a new era in Adjustment Board procedure, such as would negative any reliance whatever on a historical approach in the interpretation of the 1934 amendments.[11]

III.

The contemporaneous administrative interpretation of the Adjustment Board is significant.

The trial court found that prior to August, 1941, the

[10] A review of the historical background of the Adjustment Board is set out in the *Inquiry of the Attorney General on Administrative Procedure Relating to the National Railroad Adjustment Board (Book I), Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940, (Book II).*

[11] The First Annual Report of the National Railroad Adjustment Board, set forth as Appendix A of the First Annual Report of the National Mediation Board for the fiscal year ended June 30, 1935, contains at p. 46 the following statement:

"The First Division of the National Railroad Adjustment Board *took over the work of the four regional Boards*, adding thereto representation of many railroads not parties to any of the regional Boards, and adding also, the Switchmen's Union of North America as a party *to the First Division*. The abolition of these four regional Boards left, pending and unadjusted approximately 1,200 cases for the First Division, which cases had to be revamped to conform reasonably with the requirements of this Division, and submitted to it."

First Division of the Adjustment Board heard disputes "involving yardmasters" and rendered awards in such disputes (R. 230). The Circuit Court was of the opinion that only *three* of the nineteen decisions[12] of the First Division of the Adjustment Board offered in evidence involved yardmasters "in the proper sense of that term." The respondents, in their brief on appeal to the Circuit Court, conceded that at least *five* of these submissions involved yardmasters but attempted to distinguish the other submissions as involving at most only the yardmaster's position. Among the submissions conceded by the respondents to involve a yardmaster was Award 1649 involving the claim of one E. J. McMartin protesting his *demotion* from yardmaster to engine foreman (R. 210). However, the respondents argued that Award 1274 involving claims of certain yardmen protesting a failure of *promotion* to yardmasters under the rules of a collective contract did not involve a yardmaster dispute (R. 210). These cases are typical of the distinction sought to be made. As a result, a yard employee protesting *demotion* from yardmaster to the position of engine foreman, for instance, will, under the Circuit Court decision, present his case to the Fourth Division while a yard employee, for instance an engine foreman, protesting a failure to observe a *promotion* rule entitling him to a yardmaster position will present his case to the First Division. In view of the interlocking seniority rights of many of the rail crafts, including those of yardmasters with the other train and engine yard crafts, it is submitted that hairline distinctions of this kind will completely disorganize the work of the Adjustment Board and eventually destroy it as a practical administrative forum for the settlement of rail disputes.

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[12] These nineteen decisions are only a few of the many decisions listed in the General Index Digest of the Awards of the First Division indexed under the sub-heading "yardmasters" which appears under the general heading "Yard Service."

Prior to 1941 the First Division of the Adjustment Board, composed of ten rail experts, had in numerous submissions heard and determined yardmaster cases and recited in each of the awards the statement: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein." Surely there is not, as indicated by the Circuit Court, any presumption that the First Division had failed to consider the question of its jurisdiction over these disputes merely because of lack of discussion of this issue in the award.

IV.

The aim and policy of the Railway Labor Act is apparent from its terms and provisions.

We submit that the general scheme and design of the Railway Labor Act and particularly the provisions of Section 3, First (h) should have impelled the conclusion that jurisdiction over yardmaster disputes lay in the First Division. It does not seem an unreasonable observation to say that a contrary conclusion results in an absurdity. Obviously Congress intended the first three divisions of the Adjustment Board to hear the disputes of employees of *rail carriers* and the Fourth Division to hear the disputes of employees of *water carriers*. The Board was divided into divisions for the very purpose of achieving an administrative forum composed of men informed by long training and experience in the technical problems of the particular craft disputes to be submitted to them. It requires a most violent assumption as to Congressional purpose, unsupported by convincing proof, and contrary to every available guide to congressional purpose, to reach the conclusion that Congress intended that a well organized rail craft submit their disputes to a board representative of carriers by water and employees engaged in maritime transportation.

V.

Congress has refused to amend the Railway Labor Act to exclude yardmasters' disputes from the jurisdiction of the First Division.

Congress has twice refused to amend the Railway Labor Act so as to except yardmasters' disputes from the jurisdiction of the First Division. At the request of the American Short Line Railroad Association, bills were introduced in 1940 and 1941 in both the 76th and 77th Congress which contained the following provision:

> "The First Division of the Adjustment Board shall have jurisdiction over disputes involving train-and-yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen and yard service employees, *except yardmasters and other subordinate officers.*"

In both sessions of Congress, the Senate Committee on Interstate Commerce rejected these proposed amendments to the Railway Labor Act (R. 169-170).

CONCLUSION

Without undertaking at this time to present an adequate argument on the merits, we submit that the petition for writ of certiorari should be granted in order that this court may review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, 45 U. S. C., Sec. 151, et seq.

Section 3, First (h) of the Railway Labor Act provides as follows:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and

third divisions. This division shall consist of six members, three of whom shall be selected by the carriers, and three by the national labor organizations of the employees."

Excerpts from the testimony of Theodore L. Green, Edmund G. Kiesele, Morris E. Somerlott and F. H. Nemitz.

THEODORE L. GREEN on direct examination testified as follows (R. 191):

"Q. During that period, will you state whether or not the term 'yard service employees' has had a certain meaning in the railroad field? I am not asking you to state what the meaning is; I am asking you if it has had a certain definite meaning?

"A. It refers to certain employees who make up and break up trains in yards within defined limits.

"They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed.

"Q. Now, has it had that general meaning throughout the period of your experience and to your knowledge?

"A. Yes, sir.

"Q. Does the term as you have defined it include yardmasters?

"A. No, sir.

"Q. Can you tell the court what the history of that term is, or explain to the court how it came to have that meaning that you have ascribed to it?

"A. Well, for many years, or for as long as I can remember, employees in yard service who had the making up and breaking up of trains and the other switching as referred to before have always had a different rate of pay than employees engaged in a similar service and working with, outside those definite yard limits, or yards.

"Q. You say for many years, or as far back as you can remember, that embraces a period prior to 1934-1935, does it?

"A. Yes, sir.

"Q. For many years prior?

"A. Yes, sir.

"Q. Is there any term, or are there any terms in the railroad field that are equivalent to, or have the same meaning as the term 'yard service employees'?

"A. Yard crews, or yard men.

"Q. You mean by that answer that —

"A. They would call them yard crews or yard men —

"Q. That the term 'yard crews' and 'yard men' are the equivalent of the term 'yard service employees,' is that what you mean?

"A. Yes, sir."

Mr. Smith: "I think that is all."

On cross examination Mr. Green stated (R. 193):

Mr. Hassenauer: "Q. As a matter of fact, wouldn't you say that the work of a yardmaster is more closely allied to that of the man engaged in train and engine service than it is with any other group or lass of employees in the yard?

"A. Yes, sir."

EDMUND G. KIESELE and MORRIS E. SOMERLOTT merely concurred in the foregoing testimony by Theodore L. Green (R. 196, 197).

On direct examination, MR. F. H. NEMITZ testified as follows (R. 211-213):

"Q. Mr. Nemitz, I will ask you whether or not as a result of your experience, both as an active worker for railroads, and as a result of our experience in the last twenty-five years in the various capacities which you have described, whether or not the yard service employees among railroad men has any particular or well defined meaning or understanding?

"A. They have, yes. Usually they are considered men who work within the switching limits, or certain defined

limits, generally referred to as switchmen, or yard limits. They perform a service such as placing cars at different industries, supplying cars of different kinds at different places within those switching or yard limits, and making up and breaking up trains, that is, they break up the incoming trains and they make up the outgoing trains, fixing them in their regular order for the handling by road crews, who will take them from one terminal to some other terminal, or some other point outside of the yard limits or switching limits.

"Q. What would you say as to whether or not the class or craft of yardmasters is generally understood to be included within the term or expression of 'yard service employees'?

"A. I would say that they fit more nearly in with the yard service employees than with any other class. They don't belong in the road service. They have no rights there. They don't belong in the clerical department. They have no rights there. Usually the yardmasters hold rights as yard foremen, or as yard helpers in some yard on the railroad, where they hold rights as yardmasters, and where they perform services as yardmasters.

"Q. Do I understand you to mean by that, Mr. Nemitz, that yardmasters are usually promoted from yard employees?

"A. Quite generally, yes, sir.

"Q. And in the order of demotion in the event of lack of business, do these men who are promoted to yardmasters usually retain their seniority as a yard conductor, or yard foreman, or switch tender, or whatever craft it was they held seniority in?

"A. Yes."

On cross examination, Mr. Nemitz stated:

"Q. You concede that. Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance

'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?

"A. Yes, sir.

"Q. Now, you said you thought of yardmen, and that you understood the term to cover people that worked within the yard, or within the switching limits, as I understood your statement?

"A. That is right, such as making up and breaking up of trains, switching, and so on.

"Q. In other words, I think you somewhat qualified that, didn't you? In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weighmasters, or clerks, you don't think of those as yardmen, do you?

"A. No, sir.

"Q. So that the terms 'yard service employees,' and the equivalent terms, 'yardmen' and 'yard crews,' they don't include all of the men that work within the yard, or within the switching limits, do they?

"A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen, or clerks, and so on. Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, *which would include, in my opinion, yardmasters and assistant yardmasters.*

"Q. *Where you differ from the witnesses who testified this morning, I take it, is right at this point, that they say that the men who supervise that work that you have just referred to are not within the meaning of the terms, whereas, you include the men who do the work, and also the men who supervise it; that is the difference between* —

"A. *I do.* I might say, for this reason: I base it upon these facts, that every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, train-

men and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up under, by agreement, in 1918, the very first board in existence did that. The Western Train Service Board, upon which I served did that, as evidenced by Board decisions submitted here as an exhibit. The Southwestern Train Service Board, where I served, also did so. The Eastern, the Southeastern Board did likewise, and the present Board did likewise, as evidenced by these exhibits, and in addition to that, they make this statement, that this Board, the first division, National Railroad Adjustment Board, has jurisdiction in the dispute, in the dispute of those cases of yardmasters, and decided that there was no question about it, as I understand it, until approximately 1938, when, I believe, Judge Holly handled some sort of case."